



MEMORANDUM

FROM: Skole-ondersteuningsentrum and
Solidarity Occupational Guild: Social Workers

DATE: 9 July 2020

RE: MEDIA STATEMENT ISSUED BY THE DEPARTMENT OF SOCIAL DEVELOPMENT REGARDING THE RE-OPENING OF EARLY CHILDHOOD DEVELOPMENT INSTITUTIONS DATED 7 JULY 2020

1.

INTRODUCTION:

- 1.1 This memorandum serves to provide clarity following the media statement issued by the National Department of Social Development on 7 July 2020 and is based upon legal advice obtained from the legal representatives of Skole-ondersteuningsentrum ("SOS") and Solidarity Occupational Guild for Social Workers ("Solidarity"), which include counsel, who acted on behalf of the Applicants in the recent High Court application which culminated in the judgment delivered by the Honourable Justice Fabricius in the Pretoria High Court on 6 July 2020.
- 1.2 The full judgement is accessible at <http://hurterspies.co.za/wp-content/uploads/2020/07/Judgement.pdf>.
- 1.3 This memorandum has been drafted in English for the sake of the broader interest of the public and private ECD institutions nationwide.
- 1.4 Before we deal with the relevant content of the media statement issued by the Department of Social Development, the precise order granted by the Pretoria High Court is the starting point.

2.

HIGH COURT ORDER OF 6 JULY 2020:

2.1 In light of the uncertainty pertaining to the re-opening of private pre-schools in South Africa amid the lockdown and the view of the Minister of Social Development that the re-opening of all ECD institutions, including private pre-schools, were dependent upon Directions to be issued and published by her, SOS, Solidarity and Bronkieland Kleuterskool approached the High Court in Pretoria on an urgent basis, seeking an order, *inter alia*, in prayer 2 of the Notice of Motion, as follows:

“That it is declared that, in terms of the amendment to the Regulations issued by the Second Respondent in terms of section 27(2) Disaster Management Act, No 57 of 2002 and published in the Government Gazette on 28 May 2020 (the Alert Level 3 Regulations), all private pre-school institutions offering Early Childhood Development services (Grade R and lower) are entitled to re-open immediately.”

2.2 On 6 July 2020, His Lordship Justice Fabricius granted an order, aside from a punitive cost order against the Minister of Social Development, as follows:

“51.1 Prayer 2 of the Notice of Motion is granted subject to the appropriate and/or prescribed safety measures being in place.”

2.3 This order has effectively pronounced on the law and the rights and entitlements of all private pre-schools offering ECD programmes (Grade R and lower).

2.4 The Court’s use of the wording *“subject to the appropriate and/or prescribed safety measures being in place”* can only refer to measures embodied in laws such as the existing COVID-19 measures as prescribed in the existing Alert Level 3 Regulations issued by the Minister of Co-operative Governance and Traditional Affairs (“COGTA”) and the Directions of the Minister of Health and where relevant also Directions issued by the Minister of Employment and Labour.

3.

MEDIA STATEMENT BY THE DEPARTMENT OF SOCIAL DEVELOPMENT:

3.1 To the extent that the media statement issued by the Department of Social Development seeks to introduce or impose additional measures contained in documents which are not legislative instruments or law, such documents are not intended to form part of the order of court.

3.2 These additional measures referred to in the media statement, which seek to convey a message that ECD centres may not re-open unless there is compliance with the measures set out therein are a source of confusion and uncertainty and therefore, SOS and Solidarity have deemed it necessary to seek advice and to issue this memorandum. On 9 July 2020, the attorneys acting for SOS and

Solidarity have also addressed a letter to the Minister of Social Development demanding that the media statement be withdrawn immediately.

- 3.3 In the media statement, the Department of Social Development seeks to introduce, under the term '*appropriate and/or prescribed safety measures*' to include, *inter alia*, the following measures or requirements which ECD centres must comply with before re-opening. The media statement states the following:

“To this effect, the Department wishes to emphasise and reiterate that the re-opening of ECD centres are still subject to meeting the appropriate and/or prescribed safety measures which must/may include the following:...”

- 3.4 The distinct impression is left that there are additional measures, over and above those contained in the Regulations and existing Directions already referred to, that operate as compulsory requirements before ECD institutions may re-open. This is not correct and not in accordance with the law and the order of court.

- 3.5 In the media statement, the impression is created that the Department is at liberty to impose additional requirements and/or measures through circulars, guidelines, media statements and the like which are not legislative instruments in the form of Regulations or Directions issued in terms of the Regulations and that the court order encompasses such additional measures.

- 3.6 These so-called additional requirements imposed by the Department under the pretext of same having been included in the court order, include the following:

3.6.1 *“Standard operating procedures and guidelines for an early childhood development programme and/or partial care facility that provides an after-school service on measures to address, prevent and combat the spread of COVID-19 that was published by the Department of Social Development on 23 June 2020.”* [sic]

3.6.1.1 The aforesaid document was not placed before court as measures that require compliance and was not intended by the Court, in its judgement and order, to be complied with prior to the re-opening of ECD institutions.

3.6.1.2 Furthermore, these guidelines and procedures are not legislative instruments and do not have the force of law. Therefore, the re-opening of ECD centres cannot be made subject to compliance with the document in question.

3.6.2 *“The completion of the self-assessment form (Form 1) as required in terms of the Department of Social Development’s Circular dated 21 June 2020.”*

3.6.2.1 This document, including Form 1, likewise, merely has the status of a circular and what has been stated above in respect of the guidelines applies equally to this document. This document was not placed before the Court and the order by no

means envisaged compliance with this document before any ECD institution may re-open.

3.6.2.2 The introduction to Form 1 states the following:

“This self-assessment form must be completed by an early childhood development programme and/or partial care facility that provides an after school service and intends to re-open under duration of the state of disaster, subject to the pronouncement of a date and the conditions of such re-opening by the Minister of Social Development.

This SELF-ASSESSMENT is a series of questions and statements based on the minimum health, safety and social distancing measures on COVID-19 that an early childhood development programme and/or partial care facility must comply with before it may open and receive children again. It helps you, when you answer the questions truthfully, to be certain that you meet the minimum requirements, and also provide the information on your own assessment to the Department of Social Development to confirm that you have checked all the measures yourself.” [sic]

3.6.2.3 As the circular and Form 1, which is attached as an annexure to the said circular, is not a legislative instrument, they are not measures that are prescribed in terms of any law that requires compliance by ECD institutions and therefore, are not pre-conditions to be complied with before ECD institutions may re-open, as envisaged in court order.

3.6.3 *“The relevant provisions and requirements as set out in the Children’s Act 38 of 2005 for the registration and management of early childhood development centres.”*

3.6.3.1 Such provisions have nothing to do with the wording of the court order insofar as reference is made to ‘*appropriate and/or prescribed safety measures*’. Furthermore, it also has nothing to do with measures aimed at curbing the spread of the COVID-19 virus.

3.6.3.2 The misrepresentation is made in the media statement that such requirements form part of the court order.

3.6.4 *“Any Directions that the Minister of Social Development may issue in terms of Regulation 4(5) of the Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002.”*

3.6.4.1 The Minister of Social Development has not as yet issued any specific Directions in respect of ECD institutions.

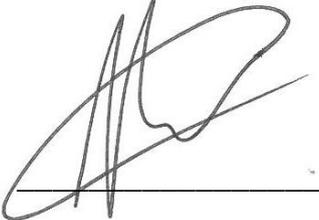
3.6.4.2 No Directions existed at the time when the court order was granted nor do they exist at the date hereof. It is unlawful to impose, as a condition for re-opening, measures that may be contained in Directions that are yet to come into existence and thereby, by implication, require ECD institutions to await the issuing of such Directions before they can re-open.

4.

CONCLUSION:

- 4.1 In light of the order of court, all private pre-school institutions offering ECD services (Grade R and lower) are entitled to re-open immediately, subject to the appropriate and/or prescribed safety measures in place.
- 4.2 To reiterate, these safety measures are those contained in existing Regulations and Directives only, which have been published in the Government Gazette such as the requirements in respect social distancing, sanitizing and washing of hands and wearing of masks.
- 4.3 These measures are to be applied and adjusted by the management of each respective pre-school and educators have to guide and orientate the children in this respect.
- 4.4 Should any private pre-school experience any difficulty with any state official from the Department of Social Development or if any further uncertainty arises, kindly contact SOS – Melanie Buys: melanie@skole.co.za and 076 850 3157 or Solidarity – Marisa Engelbrecht: marisa@solidariteit.co.za and 082 675 9256

DATED AT PRETORIA ON THE 9TH JULY 2020



ANTON VAN DER BIJL

HEAD: LEGAL DEPARTMENT

SOLIDARITY



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